The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SEAN WILSON, individually and on behalf of all others similarly situated,

Plaintiff,

v.

PLAYTIKA LTD, an Israeli limited company, and CAESARS INTERACTIVE ENTERTAINMENT, LLC, a Delaware limited liability company,

Defendant.

No. 18-cv-05277-RSL

EXPERT DECLARATION OF PROFESSOR CHARLES SILVER ON THE REASONABLENESS OF CLASS COUNSEL'S REQUEST FOR A FEE AWARD AND REIMBURSEMENT OF EXPENSES

I, CHARLES SILVER, declare as follows:

I. SUMMARY OF OPINIONS

1. Class Counsel's request for a fee award equal to 25 percent of the recovery is reasonable for a variety of reasons. It adheres to the benchmark rate set by both the Ninth Circuit and the Supreme Court of Washington. It falls below the range of rates that sophisticated clients normally pay lawyers who handle large lawsuits on contingency. And the application of three evaluative factors—the risk incurred, the customary fee, and awards in similar cases—supports it.

2. My opinion is based on my understanding of the economics of class action litigation, prevailing market rates paid by sophisticated clients in large lawsuits—both when suing individually and when serving as representatives of plaintiff classes, the risks Class Counsel incurred, and prevailing hourly rates for lawyers' services. Thus, I believe that the

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requested fee and cost award is in keeping with what class members rationally should want to pay lawyers engaged with the object of maximizing their recoveries and with what sophisticated clients actually do pay lawyers they hire to undertake the same mission.

II. CREDENTIALS

3. I hold the Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure at the University of Texas School of Law. I joined the Texas faculty in 1987, after receiving an M.A. in political science at the University of Chicago and a J.D. at the Yale Law School. I received tenure in 1991. Since then, I have been a Visiting Professor at University of Michigan School of Law (twice), the Vanderbilt University Law School, and the Harvard Law School.

4. The study of attorneys' fees has been a principal focus of my academic career. I Published my first article on the subject shortly after I joined the law faculty at the University of Texas at Austin. *See* Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 CORNELL L. REV. 656 (1991). Since then, I have published about a dozen more articles, two of which are empirical studies of fee awards in class actions. Lynn A. Baker, Michael A. Perino, and Charles Silver, *Setting Attorneys' Fees In Securities Class Actions: An Empirical Assessment*, 66 VANDERBILT L. REV. 1677 (2013); and Lynn A. Baker, Michael A. Perino, and Charles Silver, *Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions*, 115 COLUM. L. REV. 1371 (2015) ("*Is the Price Right?*"). The CORPORATE PRACTICE COMMENTATOR chose *Is the Price Right?* as one of the ten best in the field of corporate and securities law in 2016.

5. My writings are also cited and discussed in leading treatises and other authorities, including the MANUAL FOR COMPLEX LITIGATION, THIRD (1996), the MANUAL FOR COMPLEX LITIGATION, FOURTH (2004), the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, and the RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT. More recently, Justice Goodwin Liu cited several of my publications in his concurring opinion in *Laffitte v. Robert Half Int'l Inc.*, 1 Cal. 5th 480, 376 P.3d 672 (2016).

6. From 2003 through 2010, I served as an Associate Reporter on the American Law Institute's PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010). Many courts have cited the PRINCIPLES with approval, including the U.S. Supreme Court.

7. I have testified as an expert on attorneys' fees many times. Judges have cited or relied upon my opinions when awarding fees in many class actions, including *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, No. 05-MD-1720, 2019 WL 6888488 (E.D.N.Y. 2019), *In re Enron Corp. Securities, Derivative & "ERISA" Litigation*, 586 F. Supp. 2d 732 (S.D. Tex. 2008), and *Allapattah Services, Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185 (S.D. Fla. 2006), all of which settled for amounts exceeding $1 billion.

8. Finally, because awards of attorneys' fees may be thought to raise issues relating to the professional responsibilities of attorneys, I note that I have an extensive background, publication record, and experience as an expert witness testifying on matters relating to this field. I also served as the Invited Academic Member of the Task Force on the Contingent Fee created by the Tort Trial and Insurance Practice Section of the American Bar Association. In 2009, the Tort Trial and Insurance Practice Section of the American Bar Association gave me the Robert B. McKay Award in recognition of my scholarship in the areas of tort and insurance law.

9. I have attached a copy of my resume as Appendix I to this Declaration.

III. DOCUMENTS REVIEWED

10. In preparing this report, I received the items listed below which, unless noted otherwise, were generated in connection with this case. I may also have reviewed other materials, including case reports, treatises, articles published in law reviews, empirical studies, and so forth.

- Class Action Settlement Agreement
- Declaration of Todd Logan [in Support of Preliminary Approval of Proposed Settlement]
- Unopposed Motion for Preliminary Approval of Class Action Settlement Agreement

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- Order on Preliminary Approval of Class Action Settlement
- *Kater v. Churchill Downs Inc*., 886 F.3d 784 (9th Cir. 2018)
- *Mason v. Mach. Zone, Inc*., 140 F. Supp. 3d 457 (D. Md. 2015), *aff'd*, 851 F.3d 315 (4th Cir. 2017)
- Edelson PC Firm Resume

IV. FACTS

11. The facts relied upon in this Declaration are described in detail in the materials listed above. The following paragraphs provide a brief summary.

12. Social casino games are big business. In 2014, Churchill Downs, the Defendant in *Kater v. Churchill Downs Inc.*, No. 15-cv-00612-RSL (W.D. Wash.), purchased Big Fish Games for $885 million. It sold the company four years later for "nearly $1 billion." Taylor Soper, *Judge Approves $155M Class Action Settlement Related to Big Fish Games and Online Gambling Lawsuit*, GEEKWIRE, Aug. 31, 2020, *available at* https://www.geekwire.com/2020/big-fish-games-pay-155m-tweak-games-part-class-action-settlement-gambling/.

13. The defining feature of social casino games is that players must buy chips to wager but cannot win money. The games' upside potential consists of the opportunity to win free chips that can be used to play games longer without paying more.

14. Believing that social casino games violate certain states gambling statutes, Class Counsel filed six federal court lawsuits in 2015. The theory advanced was that because the chips offered as prizes for winning games had value, the games constituted gambling and were unlawful. The complaints sought to recover the dollars that class members spent on chips, along with other remedies.

15. The cases went poorly. As of mid-2016, all six had been dismissed. Shortly thereafter, the dismissal in one case, *Mason v. Machine Zone*, had been affirmed on appeal. See *Mason*, 140 F. Supp. 3d 457 (D. Md. 2015), *aff'd*, 851 F.3d 315 (4th Cir. 2017).

16. The plaintiffs' prospects brightened in 2018, when the Ninth Circuit reversed the dismissal in *Kater* and ruled that social casino games qualify as gambling under Washington law because the chips offered as prizes were items of value. *Kater v. Churchill Downs Inc.*, 886 F.3d 784 (9th Cir. 2018). Thereafter, Class Counsel filed an additional seven cases in the U.S. District Court for the Western District of Washington.

17. The instant lawsuit is part of the second wave of filings. After the Plaintiffs fended off the Defendant's efforts to have the case sent to arbitration, the parties reached a proposed settlement with the help of Layn Phillips, one of the country's most prominent mediators. If approved, the settlement will return $38 million (less attorneys' fees and expenses) to class members, who will receive amounts ranging from a minimum of 10 to more than 50 percent of their losses. The settlement will also require the Defendant to change its operations and to offer addiction-related resources and a comprehensive self-exclusion policy.

V. BACKGROUND ANALYSIS: SETTING COMMON FUND FEES ACCORDING TO MARKET RATES MAXIMIZES CLASS MEMBERS' EXPECTED RECOVERIES

18. Throughout my academic career, I have urged judges to base fee awards from common funds on rates prevailing in the private market for legal services. Although the view was not widely shared when I first expressed it, its popularity has greatly increased. Today, judges routinely want to know what market rates are and give them weight when deciding how much to award lawyers whose efforts create common funds. In this Declaration, I will show that Class Counsel's request for a fee equal to 25 percent of the recovery falls below the range of percentages that prevails in the private market, which typically runs from 30 percent to 40 percent even in cases with the potential to generate enormous recoveries.

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A. Fee-Setting Is A Positive-Sum Interaction

19. Many people think that fee-setting is a zero-sum game in which more for a lawyer means less for a client. Because the object of class litigation is to help the victims, they infer that lower fees are always better than higher ones.

20. This belief is mistaken. Fee-setting is a positive-sum interaction in which higher fees can help claimants. To see this, imagine how class members would fare if courts set common fund fee awards at 0 percent. When the fee is zero, the expected recovery is zero too because lawyers cannot afford to represent class members (or signed clients) on these terms. From class members' perspective, any fee between 1 percent and 99 percent is better than zero because any positive recovery is better than no recovery.

21. When regulating fees, then, the object should ***not*** be to set them as close to zero as possible. ***It should be to maximize class members' net expected recoveries***—the amounts they expect to take home after paying their attorneys. Because a claimant who nets $1 million after paying a 40 percent fee is better off than one who nets $500,000 after paying a 20 percent fee, it is rational for clients to offer higher percentages when doing so is expected to leave them with more money after fees are paid.

22. Judges have known this for years. In 2002, a task force on fees commissioned by the Third Circuit stated: "The goal of appointment [of class counsel] should be to maximize the net recovery to the class and to provide fair compensation to the lawyer, *not to obtain the lowest attorney fee.* The lawyer who charges a higher fee may earn a proportionately higher recovery for the class than the lawyer who charges a lesser fee." *Third Circuit Task Force Report*, 208 F.R.D. 340, 373 (Jan. 15, 2002) (emphasis added). The Seventh Circuit made a similar point in *In re Synthroid Marketing Litigation*, 264 F.3d 712 (7th Cir. 2001). It rejected the so-called "mega-fund rule," according to which fees must be capped at low percentages when recoveries are very large, noting that "[p]rivate parties would never contract for such an arrangement" because it would encourage cheap settlements. *Id.* at 718. When fees are capped at low levels,

lawyers' incentives are weakened and they may lose any financial interest in holding out for higher dollars, which are harder to recover and require lawyers to bear greater risks. Private clients want lawyers to maximize the value of their claims, not to settle them cheaply.

B. The Case For Mimicking The Market

23. In the market for legal services, claimants negotiate fees when litigation starts, not when it ends. Upfront, they see the risks that lie ahead and appreciate the virtue of paying contingent fee lawyers on terms that encourage them to bear them. As the Seventh Circuit observed,

> The best time to determine [a contingent fee lawyer's] rate is the beginning of the case, not the end (when hindsight alters the perception of the suit's riskiness, and sunk costs make it impossible for the lawyers to walk away if the fee is too low). This is what happens in actual markets. Individual clients and their lawyers never wait until after recovery is secured to contract for fees. They strike their bargains before work begins.

In re Synthroid Mktg. Litig., 264 F.3d at 718.

24. Unfortunately, judges typically set fee terms when class actions settle. Consequently, the hindsight bias may cause them to set fees too low. This can only harm class members in the long run by weakening lawyers' incentives.

25. To guard against this, I believe that judges should base fee awards on the amounts that class members would rationally have agreed to pay had they bargained directly with class counsel when litigation was about to commence. A general insight from the economics of contracts is that rational parties agree on terms that are expected to maximize the amount of wealth that is available for them to share. *See* Alan Schwartz and Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L. J. 541, 552 (2003) ("[P]arties at the negotiation stage prefer to write contracts that maximize total benefits."). When markets are competitive, as the market for legal services plainly is, clients and lawyers should settle on the lowest percentages that maximize their joint expected return. The market thus provides good evidence regarding the fees that class members would rationally want to pay.

26. The market rate also provides a natural cross-check on the reasonableness of fee requests. When a request falls within the range that sophisticated clients normally pay when hiring lawyers on contingency to handle large cases, there is reason to believe that class members would have agreed to pay it had they been able to bargain with class counsel directly before litigation commenced. The best evidence of the terms of hypothetical bargains are the terms that real clients and lawyers agree to in similar circumstances.

27. As discussed in more detail below, the information I have gathered over years of study shows that claimants typically agree to pay contingent fees in the range extending from 30 percent to 40 percent. Even sophisticated clients promise to pay fees in this range when hiring lawyers to handle large commercial lawsuits on contingency. To encourage lawyers to maximize class members' net recoveries, I believe that courts should set fee awards from common funds in this range.

VI. FEES PREVAILING IN THE PRIVATE MARKET FOR LEGAL SERVICES

A. Market Rates Increasingly Dominate the Fee-Setting Process

28. In both scholarly works and expert reports written over decades, I have urged judges to take guidance from the market for legal services when sizing fee awards. As mentioned, more and more judges are embracing the "mimic the market" approach. They increasingly understand that "market rates, where available, are the ideal proxy for [class action lawyers'] compensation." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 52 (2d Cir. 2000).

29. Although only the Seventh Circuit mandates the use of market rates, all federal circuits permit judges to take guidance from them, and judges across the country do so routinely. Examples include *Guevoura Fund Ltd. v. Sillerman*, No. 1:15-CV-07192-CM, 2019 WL 6889901, at *21 (S.D.N.Y. Dec. 18, 2019); *In re TRS Recovery Servs., Inc. & Telecheck Servs., Inc., Fair Debt Collection Practices Act (FDCPA) Litig.*, No. 2:13-MD-2426-DBH, 2016 WL 543137, at *9 (D. Me. Feb. 10, 2016); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 788 (N.D. Ill. 2015); *In re Prudential Ins. Co. of Am. SGLI/VGLI Contract Litig.*,

No. 3:10-CV-30163-MAP, 2014 WL 6968424, at *6 (D. Mass. Dec. 9, 2014); *In re New Motor Vehicles Canadian Exp. Antitrust Litig*., 842 F. Supp. 2d 346 (D. Me. 2012); *In re Trans Union Corp. Privacy Litig.*, No. 00 C 4729, 2009 WL 4799954, at *9 (N.D. Ill. Dec. 9, 2009), *order modified and remanded*, 629 F.3d 741 (7th Cir. 2011); *In re Cabletron Sys., Inc. Sec. Litig*., 239 F.R.D. 30, 40 (D.N.H. 2006).

30. When awarding fees from the enormous settlement in *Allapattah Servs., Inc.*, 454 F. Supp. 2d at 1203, which exceeded $1 billion, the federal district court judge "conclude[d] that the most appropriate way to establish a bench mark is by reference to the market rate for a contingent fee in private commercial cases tried to judgment and reviewed on appeal." Anchoring the fee to the market rate avoids arbitrariness by providing an objective basis for awarding a particular amount and also creates desirable incentives. It also "create[s] incentives for the lawyer to get the most recovery for the class by the most efficient manner (and penalize the lawyer who fails to do so)." *Nilsen v. York Cty.*, 400 F. Supp. 2d 266, 277–78 (D. Me. 2005). *See also In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig*., 56 F.3d 295, 307 (1st Cir.1995) (observing that the percentage-of-fund method eliminates incentive to be inefficient, as inefficiency just reduces the lawyer's own recovery); and *Wal–Mart Stores, Inc. v. Visa U.S.A. Inc.*,396 F.3d 96, 121 (2d Cir. 2005) (the percentage method "directly aligns the interests of the class and its counsel" and provides a powerful incentive for efficiency and early resolution).

31. State court judges see the wisdom of mimicking the market too. For example, in *Laffitte*, 1 Cal. 5th 480, 376 P.3d 672 (2016), the Supreme Court of California cited the desirability of approximating the market as a reason for permitting judges to grant percentage-based fee awards from common funds.

> We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created. The recognized advantages of the percentage method—including relative ease of calculation, alignment of

> incentives between counsel and the class, ***a better approximation of market conditions in a contingency case***, and the encouragement it provides counsel to seek an early settlement and avoid unnecessarily prolonging the litigation … convince us the percentage method is a valuable tool that should not be denied our trial courts.

Laffitte, 376 P.3d at 686 (emphasis added) (citations omitted).

32. Judges use the market-based approach and methods that approximate market conditions because they appreciate the importance of incentivizing lawyers properly and because they want an objective basis for deciding how much lawyers will be paid. The two considerations–incentives and objectivity–are linked. By taking guidance from the market, judges constrain their discretion and thereby make lawyers' incentives clearer and more reliable.

33. Although the Ninth Circuit has not formally instructed district court judges to base fee awards in class actions on prevailing market rates, it has come close to doing so. First, it has given judges discretion to use the percentage method and to do so without lodestar cross-checks. This makes sense because the market has selected against the use of the lodestar method decisively. Real plaintiffs never use it. As shown below, the percentage method dominates the market for contingent fee representations.

34. Second, the Ninth Circuit has set 25 percent of the recovery as the benchmark rate for fee awards in class actions. *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989) ("Ordinarily, . . . fee awards [from common funds] range from 20 percent to 30 percent of the fund created. We note with approval that one court has concluded that the 'bench mark' percentage for the fee award should be 25 percent.") (quoting *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 679, 692 (M.D. Ala. 1988)). *See also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) (agreeing that the benchmark award is 25 percent of the recovery). As shown below, sophisticated clients typically pay 30 percent to 40 percent of the recovery as fees when they hire lawyers on straight contingency. The benchmark is thus in the vicinity of the market range.

35. Third, the Ninth Circuit has given district courts discretion to deviate from the benchmark when warranted by identified factors, one of which is "the customary fee." *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975) (adopting the factors identified in *Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714 (5th Cir. 1974)). A lawyer's customary fee is simply his or her market rate.

36. *Johnson v. Georgia Highway Express, Inc*. also identified "awards in similar cases" as a relevant consideration. Although awards in other class actions are discussed in detail below, it bears mentioning here that as more and more courts have adopted a market-based approach, this factor has pushed ever more strongly in the same direction as "the customary fee."

37. To this point, I have focused on Ninth Circuit law. But both the size of the fee award and the means of calculating it may be governed by state law. The following passage from *Vizcaino* states both that state law applies and that, in common fund cases, Washington courts use the percentage method exclusively.

> Because Washington law governed the [substantive] claim, it also governs the award of fees. [Citation omitted.] Under Washington law, the percentage-of-recovery approach is used in calculating fees in common fund cases. *Bowles v. Dep't of Ret. Sys.*, 121 Wash. 2d 52, 72, 847 P.2d 440, 451 (1993) (holding that in a common fund case, "the size of the recovery constitutes a suitable measure of the attorneys' performance").

Vizcaino, 290 F.3d at 1047. *See also Bowles*, 847 P.2d at 451. ("This being a common fund case, we apply the percentage of recovery approach."); and *City of Seattle v. Okeson*, 137 Wash. App. 1051 (2007) ("Unlike a lodestar approach, the award of fees under the common fund doctrine is borne by the prevailing party and the court uses a percentage of recovery rather than actual hours expended in computing attorney fees.") (citing *Bowles*, 847 P.2d at 450). Because Washington courts use the percentage method exclusively, the application of Washington law should lead the Court to do the same.

38. In *Bowles*, the Supreme Court of Washington also identified 25 percent of the recovery as the benchmark rate.

> While the lodestar method is generally preferred when calculating statutory attorney fees, the percentage of recovery approach is used in calculating fees under the common fund doctrine. . . . In common fund cases, the "benchmark" award is 25 percent of the recovery obtained.

Bowles, 847 P.2d at 450-51 (emphasis deleted).

39. In sum, Washington law and Ninth Circuit precedent lead to the same result. When awarding fees from common funds, courts must use the percentage method, must use 25 percent of the recovery as the benchmark, and must or should refrain from using the lodestar method as a cross-check. Both the Ninth Circuit and the State of Washington thus adhere fairly closely to the market-based approach recommended here. The only difference is that the benchmark is slightly below the market rate, which extends from 30 percent to 40 percent, as shown below.

B. In Contingent Fee Litigation, Percentage-Based Compensation Predominates

40. Having established that market rates are "ideal" proxies, it remains to consider how the market compensates plaintiffs' attorneys. In this section and the next, I explain what I have learned about this subject.

41. I start by noting that when clients hire lawyers to handle lawsuits on straight contingency, the market sets lawyers' compensation as percentages of claimants' recoveries. Even sophisticated business clients with complex, high-dollar legal matters use the percentage approach.

42. Abundant evidence supports this contention. When two co-authors and I studied hundreds of settled securities fraud class actions specifically looking for terms included in fee agreements between lawyers and investors seeking to serve as lead plaintiffs, all the agreements we found provided for contingent percentage fees. *Is the Price Right*, *supra*. No lead plaintiff agreed to pay its lawyers by the hour; nor did any retain counsel on a lodestar-multiplier basis.

43. The finding that sophisticated businesses use contingent fee arrangements when hiring lawyers to handle securities class actions was expected. Over the course of my academic career, I have studied or participated in hundreds of class actions, many of which were led by

sophisticated business clients. To the best of my recollection, I have encountered only one in which a lead plaintiff paid class counsel out of pocket; that case is more than 100 years old and was decided before the common fund doctrine was well established. Even wealthy named plaintiffs like prescription drug wholesalers and public pension funds that, in theory, could pay lawyers by the hour use contingent, percentage-based compensation arrangements instead. Because percentage-based compensation arrangements dominate the market, courts should also use them when awarding fees from common funds.

44. The market also favors fee percentages that are flat or that rise as recoveries increase. Scales with percentages that decline at the margin are rarely employed. Professor John C. Coffee, Jr., the country's leading authority on class actions, made this point in a report filed in the antitrust litigation relating to high fructose corn syrup.

> I am aware that "declining" percentage of the recovery fee formulas are used by some public pension funds, serving as lead plaintiffs in the securities class action context. However, I have never seen such a fee contract used in the antitrust context; nor, in any context, have I seen a large corporation negotiate such a contract (they have instead typically used straight percentage of the recovery formulas).

Declaration of John C. Coffee, Jr., submitted in *In re High Fructose Corn Syrup Antitrust Litigation*, MDL 1087 (C.D. Ill. Oct. 7, 2004), Dkt. 1421, ¶ 22. My experience is similar. I know of few instances in which large corporations used scales with declining fee percentages. Instead, they use flat percentages or scales that rise with the duration of litigation or the size of the recovery.

45. The preference for flat percentages and rising scales has a sound economic basis. Flat percentages and rising scales reward plaintiffs' attorneys for recovering higher dollars that are harder to obtain. Larger recoveries demand a willingness on the part of counsel to proceed ever closer to trial, thereby increasing their costs and exposing them to greater risk of loss. In other words, flat percentages and percentages that increase with the recovery encourage attorneys to advise clients to reject inadequate settlements, even though rejections require lawyers to bear costs and risks that settling would avoid.

C. Sophisticated Clients Normally Pay Fees of 30 Percent to 40 Percent When Hiring Lawyers to Handle Commercial Lawsuits on Straight Contingency

46. Countless plaintiffs have hired lawyers on contingency to handle cases of diverse types. Consequently, the market for legal services is a rich source of information about lawyers' fees. In this section, I survey this evidence.

47. Before doing so, I wish to note that there is broad agreement that in most types of plaintiff representations contingent fees range from 30 percent to 40 percent of the recovery, and that higher fees prevail in litigation areas like medical malpractice and patents where costs and risks are unusually great.[1] *See, e.g.*, *George v. Acad. Mortg. Corp. (UT)*, 369 F. Supp. 3d 1356, 1382 (N.D. Ga. 2019) ("Plaintiffs request for approval of Class Counsel's 33% fee falls within the range of the private marketplace, where contingency-fee arrangements are often between 30 and 40 percent of any recovery"); and *Leung v. XPO Logistics, Inc*., 326 F.R.D. 185, 201 (N.D. Ill. 2018) ("a typical contingency agreement in this circuit might range from 33% to 40% of recovery"). The same range is known to prevail in high-dollar, non-class, commercial cases. *See, e.g.*, *Kapolka v. Anchor Drilling Fluids USA, LLC*, No. 2:18-CV-01007-NR, 2019 WL 5394751, at *10 (W.D. Pa. Oct. 22, 2019); and *Cook v. Rockwell Int'l Corp*., No. 90-CV-00181-JLK, 2017 WL 5076498, at *2 (D. Colo. Apr. 28, 2017).

48. The point of surveying the evidence, then, is not to establish something new. It is to show that what everyone already knows is correct. The market rate for contingent fee lawyers generally runs from 30 to 40 percent of clients' recoveries, with 33 percent being especially common.

49. We do not know as much about fees paid in large commercial lawsuits as we might. No publicly available database collects information about this sector of the market, and

[1] I have studied the costs insurance companies incur when *defending* liability suits. *See* Bernard Black, David A. Hyman, Charles Silver and William M. Sage, *Defense Costs and Insurer Reserves in Medical Malpractice and Other Personal Injury Cases: Evidence from Texas, 1988-2004*, 10 AM. L. & ECON. REV. 185 (2008). Unfortunately, this information sheds no light on the amounts that businesses pay when acting as plaintiffs.

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businesses that sue as plaintiffs often keep their fee agreements secret. Consequently, most of what is known is drawn from anecdotal reports.[2] That said, the evidence available on the use of contingent fees by sophisticated clients shows that percentages tend to fall in the indicated range.

1. Sophisticated Named Plaintiffs in Class Actions

50. Sophisticated business clients commonly agree to pay fees of 33 percent or greater when serving as lead plaintiffs in class actions. Here are a few examples.

- In *San Allen, Inc. v. Buehrer*, No. CV-07-644950 (Ohio – Court of Common Pleas), which settled for $420 million, seven businesses serving as named plaintiffs signed retainer contracts in which they agreed to pay 33.3 percent of the gross recovery obtained by settlement as fees, with a bump to 35 percent in the event of an appeal. Expenses were to be reimbursed separately.
- In *In re U.S. Foodservice, Inc. Pricing Litigation*, No. 3:07-md-1894 (AWT) (D. Conn.), a RICO class action that produced a $297 million settlement, both of the businesses that served as named plaintiffs were represented by counsel in their fee negotiations and both agreed that the fee award might be as high as 40 percent.
- In *In re International Textile Group Merger Litigation*, C.A. No. 2009-CP-23-3346 (Court of Common Pleas, Greenville County, South Carolina), which settled in 2013 for relief valued at about $81 million, five sophisticated investors serving as named plaintiffs agreed to pay 35 percent of the gross class-wide recovery as

[2] Businesses sometimes use hybrid arrangements that combine guaranteed payments with contingent bonuses. For example, when representing Caldera International, Inc. in a dispute with IBM, Boies, Schiller & Flexner LLP billed two-thirds of its lawyers' standard hourly rates and stood to receive a contingent fee equal to 20 percent of the recovery. Letter from David Boies and Stephen N. Zack to Darl McBride dated Feb. 26, 2003, *available at* https://www.sec.gov/Archives/edgar/data/1102542/000110465903028046/a03-6084_1ex99d1.htm (last visited Dec. 9, 2020). According to Wikipedia, the damages sought in the lawsuit initially totaled $1 billion, but were later increased to $3 billion, and then to $5 billion. Wikipedia, *SCO Group, Inc. v. International Business Machines Corp.*, *available at* https://en.wikipedia.org/wiki/SCO_Group,_Inc._v._International_Business_Machines_Corp. (last visited Dec. 9, 2020).

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fees, with expenses to be separately reimbursed. (The fee was initially set at over 40 percent but was later bargained down to 35 percent.)

51. Similar rates prevail in antitrust class actions in which businesses participate as plaintiffs. For example, I studied and prepared expert reports in a series of pharmaceutical cases bought against manufacturers that engaged in pay-for-delay settlements to patent challenges. The named plaintiffs in these cases were drug wholesalers. All were large companies; some were of Fortune 500 size or bigger. All also had in-house or outside counsel monitoring the litigations. The potential damages were enormous. In one case, *King Drug Company of Florence, Inc. v. Cephalon, Inc.*, No. 2:06-cv-1797-MSG (E.D. Pa. Oct. 8, 2015), the plaintiffs recovered over $500 million. In the series as a whole, they won more than $2 billion. In most of the cases, these sophisticated businesses supported fees equal to one-third of the recovery. In one case, they endorsed a fee of 30 percent and in another of 27.5 percent.

52. These cases were not exceptional. Professor Brian Fitzpatrick gathered information on an even larger number of pharmaceutical antitrust cases—33 in all—that were resolved between 2003 and 2020. According to his forthcoming article, "the fee requests ranged from a fixed percentage of 27.5% to a fixed percentage of one-third"; "one-third *heavily* dominated" the sample; and "the average was 32.85%." To confirm the point made here, which is that sophisticated clients typically pay fees in the 30 percent to 40 percent range, Professor Fitzpatrick also noted that "in the vast majority of cases, one or more of these corporate class members—often the biggest class members—came forward to voice affirmative support for the fee request, and not a single one of these corporate class members objected to the fee request in any of the 33 cases." Brian T. Fitzpatrick, *A Fiduciary Judge's Guide to Awarding Fees in Class Actions*, FORDHAM L. REV. (forthcoming 2021). Professor Fitzpatrick's table of cases appears in Appendix II.

53. In sum, when sophisticated business clients seek to recover money in risky commercial lawsuits involving large stakes, they typically pay contingent fees ranging from 30

percent to 40 percent, with fees of 33 percent or more being promised in most cases. As well, there is little variation in fee percentages across cases of different sizes.

2. Patent Cases

54. Now consider patent infringement cases, another context in which sophisticated business clients often hire law firms on contingency. There are many anecdotal reports of high percentages in this area. The most famous one relates to the dispute between NTP Inc. and Research In Motion Ltd., the company that manufactures the Blackberry. NTP, the plaintiff, promised its law firm, Wiley Rein & Fielding ("WRF"), a 33⅓ percent contingent fee. When the case settled for $612.5 million, WRF received more than $200 million in fees. Yuki Noguchi, D.C. *Law Firm's Big BlackBerry Payday: Case Fees of More Than $200 Million Are Said to Exceed Its 2004 Revenue*, WASHINGTON POST, March 18, 2006, D03, *available at* https://www.washingtonpost.com/archive/business/2006/03/18/dc-law-firms-big-blackberry-payday-span-classbankheadcase-fees-of-more-than-200-million-are-said-to-exceed-its-2004-revenuespan/8a76dbb5-0918-46b9-a7b2-4d9284d5e0d3/.

55. The fee percentage that WRF received is typical, as Professor David L. Schwartz found when he interviewed 44 experienced patent lawyers and reviewed 42 contingent fee agreements.

> There are two main ways of setting the fees for the contingent fee lawyer [in patent cases]: a graduated rate and a flat rate. Of the agreements using a flat fee reviewed for this Article, the mean rate was 38.6% of the recovery. The graduated rates typically set milestones such as "through close of fact discovery," "through trial," and "through appeal," and tied rates to recovery dates. As the case continued, the lawyer's percentage increased. Of the agreements reviewed for this Article that used graduated rates, the average percentage upon filing was 28% and the average through appeal was 40.2%.

David L. Schwartz, *The Rise of Contingent Fee Representation in Patent Litigation*, 64 ALA. L. REV. 335, 360 (2012). In a case like this one that required the lawyers to bear significant

litigation and trial preparation hours and expenses with no guarantee of payment or reimbursement, a high fixed percentage would apply.[3]

56. Clearly, in the segment of the market where sophisticated business clients hire lawyers to litigate patent cases on contingency, successful lawyers earn sizable premiums over their normal hourly rates. The reason is obvious. When waging patent cases on contingency, lawyers must incur large risks and high costs, so clients must promise them hefty returns. Patent plaintiffs have the option of paying lawyers to represent them on an hourly basis, but still prefer a contingency arrangement, even at 30-40 percent, to bearing the risks and costs of litigation themselves.

3. Other Large Commercial Cases

57. As mentioned above, many courts have observed that attorneys regularly contract for contingent fees of 33⅓percent or greater when asked to handle commercial lawsuits on straight contingency. *See, e.g.*, *Kapolka*, 2019 WL 5394751, at *10; *Lincoln Adventures LLC v. Those Certain Underwriters at Lloyd's, London Members*, No. CV 08-00235 (CCC), 2019 WL 4877563, at *8 (D.N.J. Oct. 3, 2019); *Cook v. Rockwell Int'l Corp.*, No. 90-CV-00181-JLK, 2017 WL 5076498, at *2 (D. Colo. Apr. 28, 2017); and *In re Schering-Plough Corp. Enhance Sec. Litig.*, No. CIV.A. 08-2177 DMC, 2013 WL 5505744, at *32 (D.N.J. Oct. 1, 2013).

58. Many examples support this assessment. A famous case from the 1980's involved the Texas law firm of Vinson & Elkins ("V&E"). ETSI Pipeline Project ("EPP") hired V&E to

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[3] Professor Schwartz's findings are consistent with reports found in patent blogs, one of which stated as follows.

> *Contingent Fee Arrangements*: In a contingent fee arrangement, the client does not pay any legal fees for the representation. Instead, the law firm only gets paid from damages obtained in a verdict or settlement. Typically, the law firm will receive between 33-50% of the recovered damages, depending on several factors. This is strictly a results-based system.

Matthew L. Cutler, *Contingent Fee and Other Alternative Fee Arrangements for Patent Litigation*, HARNESS DICKEY, (June 8, 2020), *available at* https://www.hdp.com/blog/2020/06/08/contingent-fee-and-other-alternative-fee-arrangements-for-patent-litigation/.

sue Burlington Northern Railroad and other defendants, alleging a conspiracy on their part to prevent EPP from constructing a $3 billion coal slurry pipeline. V&E took the case on contingency, "meaning that if it won, it would receive one-third of the settlement and, if it lost, it would get nothing." David Maraniss, Texas Law firm Passes Out $100 Million in Bonuses, WASHINGTON POST, Aug. 22, 1990, *available at* https://www.washingtonpost.com/archive/politics/1990/08/22/texas-law-firm-passes-out-100-million-in-bonuses/8714563b-10b8-4f85-b74a-1e918d030144/. After many years of litigation, a series of settlements and a $1 billion judgment against a remaining defendant yielded a gross recovery of $635 million, of which the firm received around $212 million in fees. Patricia M. Hynes, *Plaintiffs' Class Action Attorneys Earn What They Get*, 2 J. INST. FOR STUDY OF LEGAL ETHICS 243, 245 (1991). It bears emphasizing that the clients who made up the plaintiffs' consortium, Panhandle Eastern Corp., the Bechtel Group, Enron Corp. and K N Energy Inc., were sophisticated businesses with access to the best lawyers in the country. No claim of undue influence by V&E can possibly be made.

59. The National Credit Union Administration's ("NCUA") experience in litigation against securities underwriters provides a more recent example of contingent fee terms that were used successfully in large, related litigations. After placing 5 corporate credit unions into liquidation in 2010, NCUA filed 26 complaints in federal courts in New York, Kansas, and California against 32 Wall Street securities firms and banks. To prosecute the complaints, which centered on sales of investments in faulty residential mortgage-backed securities, NCUA retained two outside law firms, Korein Tillery LLP and Kellogg, Hansen, Todd, Figel, & Frederick PLLC, on a straight contingency basis. The original contract entitled the firms to 25 percent of the recovery, net of expenses. As of June 30, 2017, the lawsuits had generated more than $5.1 billion in recoveries on which NCUA had paid $1,214,634,208 in fees.[4]

[4] The following documents provide information about NCUA's fee arrangement and the recoveries obtained in the litigations: Legal Services Agreement dated Sept. 1, 2009, https://www.ncua.gov/services/Pages/freedom-of-information-act/legal-services-agreement.pdf; National Credit Union Administration, Legal Recoveries from the Corporate Crisis, https://www.ncua.gov/regulation-supervision/Pages/corporate-system-resolution/legal-

60. When it retained outside counsel on contingency, NCUA knew that billions of dollars were at stake. The failed corporate credit unions had sustained $16 billion in losses, and NCUA's objective was to recover as much of that amount as possible. It also knew that dozens of defendants would be sued and that multiple settlements were possible. Even so, NCUA agreed to pay a straight contingent percentage fee in the standard market range on all the recoveries. It neither reduced the fees that were payable in later settlements in light of fees earned in earlier ones, nor bargained for a percentage that declined as additional dollars flowed in, nor tied the lawyers' compensation to the number of hours they expended.

61. In *In re Merry-Go-Round Enterprises, Inc.*, 244 B.R. 327 (D. Md. 2000), the bankruptcy trustee wanted to assert claims against Ernst & Young. He looked for counsel willing to accept a declining scale of fee percentages, found no takers, and ultimately agreed to pay a law firm a straight 40 percent of the recovery. Ernst & Young subsequently settled for $185 million, at which point the law firm applied for $71.2 million in fees, 21 times its lodestar. The bankruptcy judge granted the request, writing: "[v]iewed at the outset of this representation, with special counsel advancing expenses on a contingency basis and facing the uncertainties and risks posed by this representation, the 40% contingent fee was reasonable, necessary, and within a market range." *Id.* at 335.

62. Based on what lawyers who write about fee arrangements in business cases have said, contingent fees of 33⅓ percent or more remain common. In 2011, The Advocate, a journal produced by the Litigation Section of the State Bar of Texas, published a symposium entitled "Commercial Law Developments and Doctrine." It included an article on alternative fee arrangements, which reported typical contingent fee rates of 33 percent to 40 percent.

> A pure contingency fee arrangement is the most traditional alternative fee arrangement. In this scenario, a firm receives a fixed or scaled percentage of any recoveries in a lawsuit brought on behalf of the client as a plaintiff. Typically, the

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recoveries.aspx; Letter from the Office of the Inspector General, National Credit Union Administration to the Hon. Darrell E. Issa, Feb. 6, 2013, https://www.ncua.gov/About/leadership/CO/OIG/Documents/OIG20130206IssaResponse.pdf.

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> contingency is approximately 33%, with the client covering litigation expenses; however, firms can also share part or all of the expense risk with clients. Pure contingency fees, which are usually negotiated at approximately 40%, can be useful structures in cases where the plaintiff is seeking monetary or monetizable damages. They are also often appropriate when the client is an individual, start up, or corporation with limited resources to finance its litigation. Even large clients, however, appreciate the budget certainty and risk-sharing inherent in a contingent fee arrangement.

Trey Cox, *Alternative Fee Arrangements: Partnering with Clients through Legal Risk Sharing*, 56 THE ADVOCATE (TEXAS) 20 (2011).

63. In sum, when seeking to recover money in class actions involving large stakes and in commercial lawsuits, sophisticated business clients typically pay contingent fees ranging from 30 percent to 40 percent, with fees of 33 percent or more being promised in most cases.

VII. RISK INCURRED

64. In the market for legal services, the percentages that contingent fee lawyers charge vary with the risks they incur. Lawyers who handle medical malpractice cases typically receive higher fees than lawyers who handle personal injury cases of other types because they incur greater costs and face more daunting prospects before judges and juries. Lawyers who handle commercial airplane crash cases often charge lower fees than others because major carriers often concede liability, leaving only damages at issue.

65. When Class Counsel filed the first cases in this series, the risk of losing was severe. The litigation track record makes that clear. Not only did the plaintiffs lose in this Court; they lost in every other district court too. Zero-for-six is both as bad as it gets and the surest sign of risk one could want. (Really, Class Counsel went zero-for-seven, having also lost the appeal in *Mason v. Machine Zone, Inc*., as mentioned.)

66. Another indicator of risk is that Class Counsel undertook the litigation without the benefit of a prior or contemporaneous governmental investigation. Many successful class actions are assisted substantially by criminal prosecutions and guilty pleas. *See, e.g.*, *In re Vitamins Antitrust Litig*., No. 99-197, 2001 WL 34312839 (D.D.C. July 16, 2001) ($365 million class

recovery and 34.6% fee award in case supported by criminal prosecutions and guilty pleas); *In re TFT-LCD (Flat Panel) [Indirect Purchaser] Antitrust Litig.*, MDL No. 1827, 2013 WL 1365900 (N.D. Cal. Apr. 3, 2013) ($1.08 billion class recovery and approximately 30% fee to class counsel and state attorneys general in case supported by sweeping criminal prosecutions and guilty pleas). To the extent that government proceedings make class actions less risky, fee awards should be higher in cases like this one, where Class Counsel spearheaded the litigation without one.

VIII. FEE AWARDS IN CASES WITH COMPARABLE MONETARY RECOVERIES

67. In my experience, judges asked to grant fee awards in class actions want to know how other courts have handled similar cases. Empirical studies, including my own study of securities class actions, find that in cases with recoveries below $100 million—the traditional "mega-fund" threshold—awards in the normal, market range prevail.

68. In a study of all federal class actions that settled in 2006 or 2007, Professor Brian Fitzpatrick confirmed that the range of fee awards mirrors the private market fairly well. He found that the vast majority of fee awards (exclusive of costs) ran from 25 percent of the recovery to 40 percent, and that more awards fell into the 30-35 percent range than any other. Brian T. Fitzpatrick, 7 J. OF EMPIRICAL LEGAL STUDIES 811, 834 Fig. 4 (2010).

69. Using a variety of sources, Professors Theodore Eisenberg and Geoffrey P. Miller assembled a dataset of settlements in class actions and shareholder derivative suits that covered a longer period: 1993-2008. Theodore Eisenberg and Geoffrey P. Miller, *Attorneys Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. OF EMPIRICAL LEGAL STUDIES 248 (2010). They reported that, across all cases, fees averaged 23 percent of recoveries and had a median (half above/half below) of 24 percent. In the Ninth Circuit, both the average and the median were 25 percent. *Id.* at 260. Because the Ninth Circuit chose 25 percent as the benchmark rate, these findings are unsurprising.

70. With help from a new coauthor, Professors Eisenberg and Miller published an updated study that expanded the period covered to 2013. Theodore Eisenberg, Geoffrey Miller & Roy Germano, *Attorneys' Fees in Class Actions: 2009-2013*, 92 N.Y.U. L. REV. 937 (2017). The more recent data showed that fees increased slightly. For the entire dataset, the mean and median awards were 27 percent and 29 percent, respectively. In the Ninth Circuit, the corresponding numbers were 26 percent and 25 percent. The authors also observed that "[f]ederal judges recognize the value of empirical research in the area of class action attorneys' fees and rely extensively on those studies when assessing fee requests in particular cases."

71. Here, Class Counsel have applied for fees equal to 25 percent of the recovery. In cases with settlements of this size, there are hundreds or even thousands of class actions with similar awards. For example, the 2019 Antitrust Annual Report finds that in class actions with recoveries in the $10 million to $49 million range, the median (half above/half below) fee award was 31 percent. Joshua Davis and Rose Kohles, 2019 ANTITRUST ANNUAL REPORT: CLASS ACTION FILINGS IN FEDERAL COURT 26, Fig. 14 (2020). The median award was 30 percent for the entire dataset of antitrust cases too.

IX. LODESTAR CROSS-CHECK

72. In keeping with the market-based approach that I recommend, neither the Washington Supreme Court nor the Ninth Circuit has embraced the lodestar method as a means of sizing fee awards from common funds. The former has rejected it entirely. The latter permits lodestar cross-checks but does not mandate them. To the contrary, in the Ninth Circuit, "'the primary basis of the fee award remains the percentage method.'" *Craft v. Cty. of San Bernardino*, 624 F. Supp. 2d 1113, 1123 (C.D. Cal. 2008) (quoting *Vizcaino*, 290 F.3d at 1050). *See also* Manual for Complex Litigation, Fourth 14.121 (2004) ("the lodestar method is difficult to apply, time consuming to administer, inconsistent in result, ... capable of manipulation, ... [and] creates inherent incentive to prolong the litigation").

73. I believe that lodestar cross-checks are undesirable. I hold this opinion, first, because sophisticated clients never use the lodestar approach—not even for the purpose of cross-checking fees—when they employ lawyers on straight contingency. They use the percentage method exclusively, as previously explained. I can see no reason for courts to employ a fee award formula that the market has rejected.

74. My second reason for opposing the use of lodestar cross-checks is that they introduce all of the problems that percentage-based formulas are designed to avoid. By assigning significant weight to hours worked, courts encourage lawyers to expend time rather than to garner the largest possible recovery in the shortest span of time. In other words, lodestar cross-checks penalize efficiency and reward delay, exactly the opposite of what plaintiffs want.

75. A third problem is that lodestar cross-checks weaken the connection between fees and recoveries, the connection that lashes class counsel's interests fast to class members' wellbeing. The contingent percentage approach rewards lawyers automatically and at all points for putting more money in clients' pockets. The lodestar does not. To the contrary, it leaves uncertain both whether a larger recovery will generate a larger fee and, more importantly, how large any incremental increase will be. These effects discourage lawyers from taking risks that class members would rationally want them to accept. Commentators agree that the lodestar method encourages cheap settlements because it gives class counsel too weak an interest in maximizing claimants' recoveries.

76. Finally, on the market-based approach that I endorse, lodestar cross-checks can be dispensed with because the market provides its own cross-check on the reasonableness of fee requests. Evidence drawn from the market provides an objective and independent standard on the basis of which an assessment can be made. I see no obvious reason for courts to make a second cross-check based on an inferior method.

X. COMPENSATION

77. I am being compensated for providing this expert opinion. I was paid a flat fee for providing this report and two others in related litigations. The fee was agreed to in advance and is not contingent upon the content of my opinions.

XI. CONCLUSION

78. For the reasons set out above, I believe that Class Counsel's request for a fee award equal to 25 percent of the gross recovery is in line with the market and with awards in comparable cases and thus is reasonable.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct. Executed this 12th day of December 2020, at Empire, Michigan.

Professor Charles Silver

CHARLES SILVER

APPENDIX I: RESUME OF PROFESSOR CHARLES SILVER

CHARLES SILVER

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ACADEMIC EMPLOYMENTS

School of Law, University of Texas at Austin, 1987-2015
Roy W. and Eugenia C. McDonald Endowed Chair in Civil Procedure
W. James Kronzer Chair in Trial & Appellate Advocacy
Cecil D. Redford Professor
Robert W. Calvert Faculty Fellow
Graves, Dougherty, Hearon & Moody Centennial Faculty Fellow
Assistant Professor

University of Michigan Law School, Fall 2018
Visiting Professor

Harvard Law School, Fall 2011
Visiting Professor

Vanderbilt University Law School, Fall 2003
Visiting Professor

University of Michigan Law School, Fall 2018 & Fall 1994
Visiting Professor

University of Chicago, 1983-1984
Managing Editor, *Ethics: A Journal of Social, Political and Legal Philosophy*

EDUCATION

Yale Law School, JD (1987)
University of Chicago, MA (Political Science) (1981)
University of Florida, BA (Political Science) (1979)

PUBLICATIONS

Special Projects
Books

PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (with Samuel Issacharoff, Reporter, and Robert Klonoff and Richard Nagareda, Associate Reporters) (American Law Institute 2010).

Invited Academic Member, ABA/Tort Trial & Insurance Practice Section, Task Force on Contingent Fees, "Report on Contingent Fees In Class Action Litigation," 25 REV. LITIG. 459 (2006).

Invited Academic Member, ABA/Tort Trial & Insurance Practice Section, Task Force on Contingent Fees, "Report on Contingent Fees In Mass Tort Litigation," 42 TORT TRIAL & INS. PRAC. L. J. 105 (2006).

Invited Academic Member, ABA/Tort Trial & Insurance Practice Section, Task Force on Contingent Fees, "Report on Contingent Fees In Medical Malpractice Litigation," 25 REV. LITIG. 459 (2006).

PRACTICAL GUIDE FOR INSURANCE DEFENSE LAWYERS (2002) (with Ellen S. Pryor and Kent D. Syverud, Co-Reporters); published on the IADC website (2003); revised and distributed to all IADC members as a supplement to the DEF. COUNS. J. (2004).

BOOKS

MEDICAL MALPRACTICE LITIGATION: HOW IT WORKS, WHAT IT DOES, AND WHY TORT REFORM HASN'T HELPED (with Bernard S. Black, David A. Hyman, Myungho Paik, and William M. Sage) (Cato Institute, forthcoming 2019).

OVERCHARGED: WHY AMERICANS PAY TOO MUCH FOR HEALTH CARE (with David A. Hyman) (Cato Institute, 2018).

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PROFESSIONAL RESPONSIBILITIES OF INSURANCE DEFENSE COUNSEL (with William T. Barker) (LexisNexis 2012) (updated annually through 2017).

Articles and Book Chapters by Subject Area (* indicates Peer Reviewed)
Health Care Law & Policy

1. "There is a Better Way: Give Medicaid Beneficiaries the Money," (with David A. Hyman) (under submission).

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2. "Regulating Pharmaceutical Companies' Financial Largesse," 7:25 ISRAELI J. HEALTH POLICY RES. (2018), https://doi.org/10.1186/s13584-018-0220-5 (with Ronen Avraham).*

3. "Medical Malpractice Litigation," (with David A. Hyman) OXFORD RESEARCH ENCYCLOPEDIA OF ECONOMICS AND FINANCE (2019), DOI: 10.1093/acrefore/9780190625979.013.365.*

4. "It Was on Fire When I Lay Down on It: Defensive Medicine, Tort Reform, and Healthcare Spending," (with David A. Hyman) OXFORD HANDBOOK OF AMERICAN HEALTH LAW, I. Glenn Cohen, Allison Hoffman, and William M. Sage, eds. (2017).*

5. "Compensating Persons Injured by Medical Malpractice and Other Tortious Behavior for Future Medical Expenses Under the Affordable Care Act," (with Maxwell J. Mehlman, Jay Angoff, Patrick A. Malone, and Peter H. Weinberger)25 ANNALS OF HEALTH LAW 35 (2016).

6. **"**Double, Double, Toil and Trouble: Justice-Talk and the Future of Medical Malpractice Litigation," (with David A. Hyman) 63 DEPAUL L. REV. 574 (2014) (invited symposium).

7. "Five Myths of Medical Malpractice," (with David A. Hyman) 143:1 CHEST 222-227 (2013).*

8. "Health Care Quality, Patient Safety and the Culture of Medicine: 'Denial Ain't Just A River in Egypt,'" (with David A. Hyman), 46 NEW ENGLAND L. REV. 101 (2012) (invited symposium).

9. "Medical Malpractice and Compensation in Global Perspective: How Does the U.S. Do It?" (coauthored with David A. Hyman) MEDICAL MALPRACTICE AND COMPENSATION IN GLOBAL PERSPECTIVE (Ken Oliphant & Richard W. Wright, eds. 2013)*; originally published in 87 CHICAGO-KENT L. REV. 163 (2012).

10. "Justice Has (Almost) Nothing to Do With It: Medical Malpractice and Tort Reform," in Rosamond Rhodes, Margaret P. Battin, and Anita Silvers, eds., MEDICINE AND SOCIAL JUSTICE, Oxford University Press 531-542 (2012) (with David A. Hyman).*

11. "Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid," 59 VANDERBILT L. REV. 1085 (2006) (with David A. Hyman) (invited symposium).

12. "Medical Malpractice Reform Redux: Déjà Vu All Over Again?" XII WIDENER L. J. 121 (2005) (with David A. Hyman) (invited symposium).

13. "Speak Not of Error," REGULATION (Spring 2005) (with David A. Hyman).

14. "The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?" 90 CORNELL L. REV. 893 (2005) (with David A. Hyman).

15. "Believing Six Improbable Things: Medical Malpractice and 'Legal Fear,'" 28 HARV. J. L. AND PUB. POL. 107 (2004) (with David A. Hyman) (invited symposium).

16. "You Get What You Pay For: Result-Based Compensation for Health Care," 58 WASH & LEE L. REV. 1427 (2001) (with David A. Hyman).

17. "The Case for Result-Based Compensation in Health Care," 29 J. L. MED. & ETHICS 170 (2001) (with David A. Hyman).*

Studies of Medical Malpractice Litigation

18. "Fictions and Facts: Medical Malpractice Litigation, Physician Supply, and Health Care Spending in Texas Before and After HB 4," 51 TEX. TECH. L. REV. 627 (2019). (with David A. Hyman and Bernard Black) (invited symposium on the 15th anniversary of the enactment of HB4).

19. "Insurance Crisis or Liability Crisis? Medical Malpractice Claiming in Illinois, 1980-2010," 13 J. OF EMPIRICAL LEGAL STUDIES 183 (2016) (with Bernard S. Black, David A. Hyman, and Mohammad H. Rahmati).

20. "Policy Limits, Payouts, and Blood Money: Medical Malpractice Settlements in the Shadow of Insurance," 5 U.C. IRVINE L. REV. 559 (2015) (with Bernard S. Black, David A. Hyman, and Myungho Paik) (invited symposium).

21. "Does Tort Reform Affect Physician Supply? Evidence from Texas," INT'L REV. OF L. & ECON. (2015) (with Bernard S. Black, David A. Hyman, and Myungho Paik), available at http://dx.doi.org/10.1016/j.irle.2015.02.002.*

22. "How do the Elderly Fare in Medical Malpractice Litigation, Before and After Tort Reform? Evidence From Texas" (with Bernard S. Black, David A. Hyman, Myungho Paik, and William M. Sage), AMER. L. & ECON. REV. (2012), doi: 10.1093/aler/ahs017.*

23. "Will Tort Reform Bend the Cost Curve? Evidence from Texas" (with Bernard S. Black, David A. Hyman, Myungho Paik), 9 J. OF EMPIRICAL LEGAL STUDIES 173-216 (2012).*

24. "O'Connell Early Settlement Offers: Toward Realistic Numbers and Two-Sided Offers," 7 J. OF EMPIRICAL LEGAL STUDIES 379 (2010) (with Bernard S. Black and David A. Hyman).*

25. "The Effects of 'Early Offers' on Settlement: Evidence From Texas Medical Malpractice Cases, 6 J. OF EMPIRICAL LEGAL STUDIES 723 (2009) (with David A. Hyman and Bernard S. Black).*

26. "Estimating the Effect of Damage Caps in Medical Malpractice Cases: Evidence from Texas," 1 J. LEGAL ANALYSIS 355 (2009) (with David A. Hyman, Bernard S. Black, and William M. Sage) (inaugural issue).*

27. "The Impact of the 2003 Texas Medical Malpractice Damages Cap on Physician Supply and Insurer Payouts: Separating Facts from Rhetoric," 44 THE ADVOCATE (TEXAS) 25 (2008) (with Bernard S. Black and David A. Hyman) (invited symposium).

28. "Malpractice Payouts and Malpractice Insurance: Evidence from Texas Closed Claims, 1990-2003," 3 GENEVA PAPERS ON RISK AND INSURANCE: ISSUES AND PRACTICE 177-192 (2008) (with Bernard S. Black, David A. Hyman, William M. Sage and Kathryn Zeiler).*

29. "Physicians' Insurance Limits and Malpractice Payments: Evidence from Texas Closed Claims 1990-2003," J. LEGAL STUD. S9 (2007) (with Bernard S. Black, David A. Hyman, William M. Sage, and Kathryn Zeiler).*

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33. "Medical Malpractice Litigation and the Market for Plaintiff-Side Representation: Evidence from Illinois," 13 J. OF EMPIRICAL LEGAL STUDIES 603-636 (2016) (with David A. Hyman, Mohammad Rahmati, Bernard S. Black).*

34. "The Economics of Plaintiff-Side Personal Injury Practice," U. ILL. L. REV. 1563 (2015) (with Bernard S. Black and David A. Hyman).

35. "Access to Justice in a World without Lawyers: Evidence from Texas Bodily Injury Claims," 37 FORDHAM URB. L. J. 357 (2010) (with David A. Hyman) (invited symposium).

36. "Defense Costs and Insurer Reserves in Medical Malpractice and Other Personal Injury Cases: Evidence from Texas, 1988-2004," 10 AMER. LAW. & ECON. REV. 185 (2008) (with Bernard S. Black, David A. Hyman, and William M. Sage).*

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37. "The Mimic-the-Market Method of Regulating Common Fund Fee Awards: A Status Report on Securities Fraud Class Actions," RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION, Sean Griffith, Jessica Erickson, David H. Webber, and Verity Winship, Eds. (forthcoming 2018).

38. "Is the Price Right? An Empirical Study of Fee-Setting in Securities Class Actions," 115 COLUMBIA L. REV. 1371 (2015) (with Lynn A. Baker and Michael A. Perino).

39. "Regulation of Fee Awards in the Fifth Circuit," 67 THE ADVOCATE (TEXAS) 36 (2014) (invited submission).

40. "Setting Attorneys' Fees In Securities Class Actions: An Empirical Assessment," 66 VANDERBILT L. REV. 1677 (2013) (with Lynn A. Baker and Michael A. Perino).

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Liability Insurance and Insurance Defense Ethics

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52. "Insurer Rights to Limit Costs of Independent Counsel," ABA/TIPS INSURANCE COVERAGE LITIG. SECTION NEWSLETTER 1 (Aug. 2014) (with William T. Barker).

53. "Litigation Funding Versus Liability Insurance: What's the Difference?," 63 DEPAUL L. REV. 617 (2014) (invited symposium).

54. "Ethical Obligations of Independent Defense Counsel," 22:4 INSURANCE COVERAGE (July-August 2012) (with William T. Barker), available at http://apps.americanbar.org/litigation/committees/insurance/articles/julyaug2012-ethical-obligations-defense-counsel2.html.

55. "Settlement at Policy Limits and The Duty to Settle: Evidence from Texas," 8 J. OF EMPIRICAL LEGAL STUDIES 48-84 (2011) (with Bernard S. Black and David A. Hyman).*

56. "When Should Government Regulate Lawyer-Client Relationships? The Campaign to Prevent Insurers from Managing Defense Costs," 44 ARIZ. L. REV. 787 (2002) (invited symposium).

57. "Defense Lawyers' Professional Responsibilities: Part II – Contested Coverage Cases," 15 G'TOWN J. LEGAL ETHICS 29 (2001) (with Ellen S. Pryor).

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59. "Flat Fees and Staff Attorneys: Unnecessary Casualties in the Battle over the Law Governing Insurance Defense Lawyers," 4 CONN. INS. L. J. 205 (1998) (invited symposium).

60. "The Lost World: Of Politics and Getting the Law Right," 26 HOFSTRA L. REV. 773 (1998) (invited symposium).

61. "Professional Liability Insurance as Insurance and as Lawyer Regulation: A Comment on Davis, Institutional Choices in the Regulation of Lawyers," 65 FORDHAM L. REV. 233 (1996) (invited symposium).

62. "All Clients are Equal, But Some are More Equal than Others: A Reply to Morgan and Wolfram," 6 COVERAGE 47 (1996) (with Michael Sean Quinn).

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64. "The Professional Responsibilities of Insurance Defense Lawyers," 45 DUKE L. J. 255 (1995) (with Kent D. Syverud); reprinted in IX INS. L. ANTHOL. (1996) and 64 DEF. L. J. 1 (Spring 1997).

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Class Actions, Mass Actions, and Multi-District Litigations

69. "What Can We Learn by Studying Lawyers' Involvement in Multidistrict Litigation? A Comment on *Williams, Lee, and Borden, Repeat Players in Federal Multidistrict Litigation*," 5 J. OF TORT L. 181 (2014), DOI: 10.1515/jtl-2014-0010 (invited symposium).

70. "The Responsibilities of Lead Lawyers and Judges in Multi-District Litigations," 79 FORDHAM L. REV. 1985 (2011) (invited symposium).

71. "The Allocation Problem in Multiple-Claimant Representations," 14 S. CT. ECON. REV. 95 (2006) (with Paul Edelman and Richard Nagareda).*

72. "A Rejoinder to *Lester Brickman, On the Theory Class's Theories of Asbestos Litigation,"* 32 PEPP. L. REV. 765 (2005).

73. "Merging Roles: Mass Tort Lawyers as Agents and Trustees," 31 PEPP. L. REV. 301 (2004) (invited symposium).

74. "We're Scared To Death: Class Certification and Blackmail," 78 N.Y.U. L. REV. 1357 (2003).

75. "The Aggregate Settlement Rule and Ideals of Client Service," 41 S. TEX. L. REV. 227 (1999) (with Lynn A. Baker) (invited symposium).

76. "Representative Lawsuits & Class Actions," in B. Bouckaert & G. De Geest, eds., INT'L ENCY. OF L. & ECON. (1999).*

77. "I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds," 84 VA. L. REV. 1465 (1998) (with Lynn A. Baker) (invited symposium).

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79. "Comparing Class Actions and Consolidations," 10 TEX. REV. OF LITIG. 496 (1991).

80. "Justice in Settlements," 4 SOC. PHIL. & POL. 102 (1986) (with Jules L. Coleman).*

General Legal Ethics and Civil Litigation

81. "A Private Law Defense of Zealous Representation" (in progress), available at http://ssrn.com/abstract=2728326.

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83. "Fiduciaries and Fees," 79 FORDHAM L. REV. 1833 (2011) (with Lynn A. Baker) (invited symposium).

84. "Ethics and Innovation," 79 GEORGE WASHINGTON L. REV. 754 (2011) (invited symposium).

85. "In Texas, Life is Cheap," 59 VANDERBILT L. REV. 1875 (2006) (with Frank Cross) (invited symposium).

86. "Introduction: Civil Justice Fact and Fiction," 80 TEX. L. REV. 1537 (2002) (with Lynn A. Baker).

87. "Does Civil Justice Cost Too Much?" 80 TEX. L. REV. 2073 (2002).

88. "A Critique of *Burrow v. Arce*," 26 WM. & MARY ENIR. L. & POLICY REV. 323 (2001) (invited symposium).

89. "What's Not To Like About Being A Lawyer?" 109 YALE L. J. 1443 (2000) (with Frank B. Cross) (review essay).

90. "Preliminary Thoughts on the Economics of Witness Preparation," 30 TEX. TECH. L. REV. 1383 (1999) (invited symposium).

91. "And Such Small Portions: Limited Performance Agreements and the Cost-Quality/Access Trade-Off," 11 G'TOWN J. LEGAL ETHICS 959 (1998) (with David A. Hyman) (invited symposium).

92. "Bargaining Impediments and Settlement Behavior," in D.A. Anderson, ed., DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP (1996) (with Samuel Issacharoff and Kent D. Syverud).

93. "The Legal Establishment Meets the Republican Revolution," 37 S. TEX. L. REV. 1247 (1996) (invited symposium).

94. "Do We Know Enough about Legal Norms?" in D. Braybrooke, ed., SOCIAL RULES: ORIGIN; CHARACTER; LOGIC: CHANGE (1996) (invited contribution).

95. "Integrating Theory and Practice into the Professional Responsibility Curriculum at the University of Texas," 58 LAW AND CONTEMPORARY PROBLEMS 213 (1995) (with Amon Burton, John S. Dzienkowski, and Sanford Levinson,).

96. "Thoughts on Procedural Issues in Insurance Litigation," VII INS. L. ANTHOL. (1994).

Legal and Moral Philosophy

97. "Elmer's Case: A Legal Positivist Replies to Dworkin," 6 L & PHIL. 381 (1987).*

98. "Negative Positivism and the Hard Facts of Life," 68 THE MONIST 347 (1985).*

99. "Utilitarian Participation," 23 SOC. SCI. INFO. 701 (1984).*

Practice-Oriented Publications

100. "Your Role in a Law Firm: Responsibilities of Senior, Junior, and Supervisory Attorneys," in F.W. Newton, ed., A GUIDE TO THE BASICS OF LAW PRACTICE (3D) (Texas Center for Legal Ethics and Professionalism 1996).

101. "Getting and Keeping Clients," in F.W. Newton, ed., A GUIDE TO THE BASICS OF LAW PRACTICE (3D) (Texas Center for Legal Ethics and Professionalism 1996) (with James M. McCormack and Mitchel L. Winick).

102. "Advertising and Marketing Legal Services," in F.W. Newton, ed., A GUIDE TO THE BASICS OF LAW PRACTICE (Texas Center for Legal Ethics and Professionalism 1994).

103. "Responsibilities of Senior and Junior Attorneys," in F.W. Newton, ed., A GUIDE TO THE BASICS OF LAW PRACTICE (Texas Center for Legal Ethics and Professionalism 1994).

104. "A Model Retainer Agreement for Legal Services Programs: Mandatory Attorney's Fees Provisions," 28 CLEARINGHOUSE REV. 114 (June 1994) (with Stephen Yelenosky).

Miscellaneous

105. "Public Opinion and the Federal Judiciary: Crime, Punishment, and Demographic Constraints," 3 POP. RES. & POL. REV. 255 (1984) (with Robert Y. Shapiro).*

PERSONAL

Married to Cynthia Eppolito, PA; Daughter, Katherine; Stepson, Mabon.

Consults with attorneys and serves as an expert witness on subjects in his areas of expertise.

First generation of family to attend college.

APPENDIX II: TABLE OF FEE AWARDS IN DIRECT PURCHASER PHARMACEUTICAL ANTITRUST CLASS ACTIONS

Direct-Purchaser Pharmaceutical Antitrust Settlements, April 2003-April 2020

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agreement	Class Member Objections	Class Member Support
11/09/18	*Hartig Drug Company Inc. v. Senju Pharmaceutical Co. Ltd. et al*, No. 14-00719 (D. Del.)	$9,000,000	33.33%	N/A	None	No
10/24/18	*In Re: Blood Reagents Antitrust Litigation*, No. 09-md-02081 (E.D. Pa.)	$41,500,000	33.33%	N/A	None	No
09/20/18	*In re Lidoderm Antitrust Litigation,* No. 14-md-02521 (N.D. Cal.)	$166,000,000	27.11%	33.33%	None	Yes
07/18/18	*In re Solodyn (Minocycline Hydrochloride) Antitrust Litigation*, No. 14-md-02503 (D. Mass.)	$72,500,000	31.45%	N/A	None	No
04/18/18	*American Sales Company, LLC v. Pfizer, Inc.*, No. 4-cv-00361 (E.D. Va.)	$94,000,000	32.69%	33.33%	None	Yes

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agreement	Class Member Objections	Class Member Support
12/19/17	*In re Aggrenox Antitrust Litigation,* No. 14-md-02516 (D. Conn.)	$146,000,000	33.33%	33.33%	None	Yes
12/07/17	*In re Asacol Antitrust Litigation,* No. 15-cv-12730 (D. Mass.)	$15,000,000	33.33%	N/A	None	Yes
10/23/17	*Castro v. Sanofi Pasteur, Inc.*, No. 11-cv-7178 (D.N.J.)	$61,500,000	33.33%	N/A	None	Yes
10/05/17	*In re K-Dur Antitrust Litigation*, No. 01-cv-01652 (D.N.J.)	$60,200,000	33.33%	N/A	None	Yes
10/15/15	*King Drug Company of Florence, Inc. v. Cephalon, Inc., et al*, No. 06-cv-01797 (E.D. Pa.)	$512,000,000	27.50%	N/A	None	Yes
05/20/15	*In re Prograf Antitrust Litig.*, No. 11-md-2242 (D. Mass.)	$98,000,000	33.33%	N/A	None	Yes
01/20/15	*In re Prandin Direct Purchaser Antitrust Litig.*, No. 10-cv-12141 (E.D. Mich.)	$19,000,000	33.33%	N/A	None	Yes

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agreement	Class Member Objections	Class Member Support
09/16/14	*Mylan Pharmaceuticals, Inc. v. Warner Chilcott PLC*, No. 12-cv-3824 (E.D. Pa.)	$15,000,000	33.33%	N/A	None	No
08/06/14	*Louisiana Wholesale v. Pfizer, Inc., et al*, No. 02-cv-01830 (D.N.J.)	$190,416,438	33.33%	N/A	None	Yes
06/30/14	*In re Skelaxin (Metaxalone) Antitrust Litigation*, No. 12-md-2343 (E.D. Tenn.)	$73,000,000	33.33%	N/A	None	Yes
4/16/14	*In Re: Plasma-Derivative Protein Therapies Antitrust Litigation*, No. 09-07666 (N.D. Ill.)	$64,000,000	33.33%	N/A	None	No
06/14/13	*American Sales Company, Inc. v. Smithkline Beecham Corporation*, No. 08-cv-03149 (E.D. Pa.)	$150,000,000	33.33%	N/A	None	Yes

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agreement	Class Member Objections	Class Member Support
04/10/13	*Louisiana Wholesale Drug Company, Inc. v. Becton Dickinson & Company, Inc.*, No. 05-cv-01602 (D.N.J.)	$45,000,000	33.33%	N/A	None.	Yes
11/07/12	*In re Wellbutrin XL Antitrust Litigation*, No. 08-cv-2431 (E.D. Pa.)	$37,500,000	33.33%	N/A	None	Yes
05/31/12	*Rochester Drug Co-Operative, Inc., v. Braintree Laboratories, Inc.*, No. 07-cv-142 (D. Del.)	$17,250,000	33.33%	N/A	None	Yes
01/12/12	*In re Metoprolol Succinate Antitrust Litigation*, No. 06-cv-52 (D. Del.)	$20,000,000	33.33%	N/A	None	Yes
11/28/11	*In re DDAVP Direct Purchaser Antitrust Litigation*, No. 05-cv-2237 (S.D.N.Y.)	$20,250,000	33.33%	N/A	None	Yes
11/21/11	*In re Wellbutrin SR Antitrust Litigation*, No. 04-cv-5525 (E.D. Pa.)	$49,000,000	33.33%	N/A	None	Yes

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agreement	Class Member Objections	Class Member Support
08/11/11	*Meijer, Inc. v. Abbott Laboratories*, No. 07-cv-05985 (N.D. Cal.)	$52,000,000	33.33%	N/A	None	Yes
01/31/11	*In re Nifedipine Antitrust Litigation*, No. 03-mc-223 (D.D.C.)	$35,000,000	33.33%	N/A	None	Yes
01/25/11	*In re Oxycontin Antitrust Litigation*, No. 04-md-1603 (S.D.N.Y.)	$16,000,000	33.33%	N/A	None	Yes
04/23/09	*In re Tricor Direct Purchaser Litigation*, No. 05-340 (D. Del.)	$250,000,000	33.33%	N/A	None	Yes
04/20/09	*Meijer, Inc. v. Barr Pharmaceuticals, Inc.*, No. 05-cv-2195 (D.D.C.)	$22,000,000	33.33%	N/A	None	Yes
11/09/05	*In re Remeron Direct Purchaser Antitrust Litigation*, No. 03-cv-00085 (D.N.J.)	$75,000,000	33.33%	N/A	None	Yes

Date	Case Name	Settlement Amount	Fee Percentage Requested	Retainer Agreement	Class Member Objections	Class Member Support
04/19/05	*In re Terazosin Hydrochloride Antitrust Litigation*, No. 99-md-1317 (S.D. Fla.)	$74,572,327	32.41%	N/A	None	Yes
11/30/04	*North Shore Hematology-Oncology Associates, P.C. v. Bristol-Myers Squibb Co.*, No. 04-cv-248 (D.D.C.)	$50,000,000	33.33%	N/A	None	No
04/09/04	*In re Relafen Antitrust Litigation*, No. 01-cv-12239 (D. Mass.)	$175,000,000	33.33%	N/A	None	No
04/11/03	*Louisiana Wholesale Drug Co. v. Bristol-Myers Squibb Co.*, No. 01-cv-7951 (S.D.N.Y.)	$220,000,000	32.96%	N/A	None	Yes
			N = 33 **Median = 33.33%** **Mean = 32.85%**	**3/33**	**0/33**	**26/33**